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JAMES H. McKENNEY,
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Supreme Court of the United States.

Brief of Hughes & Kirlin for Plymothian (on pet'n)

OCTOBER TERM, 1895—No. ____

IN THE MATTER OF THE PETITION

Filed Oct 14, 1895.

THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, THE CLAIMANT OF THE STEAMSHIP "PLYMOTHIAN," FOR A WRIT OF CERTIORARI, IN THE SUITS OF

THE CANTON INSURANCE COMPANY, LIMITED, ET AL.,
Appellants,

AGAINST

CLAIMANTS OF THE STEAMSHIP "VICTORY" AND CLAIMANTS OF THE STEAMSHIP "PLYMOTHIAN,"
Appellees,

AND

CLAIMANTS OF THE STEAMSHIP "VICTORY,"
Appellants,

AGAINST

THE CANTON INSURANCE COMPANY, LIMITED, AND CLAIMANTS OF THE STEAMSHIP "PLYMOTHIAN,"
Appellees.

BRIEF FOR THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

WHITEHURST & HUGHES AND
CONVERS & KIRLIN,
Proctors for Petitioner.

FLOYD HUGHES AND
J. PARKER KIRLIN,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1895.

No.

IN THE MATTER OF THE PETITION
OF
THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, the Claimant of the Steamship "PLYMOTHIAN," for a Writ of *Certiorari* in the suits of:
THE CANTON INSURANCE COMPANY, LIMITED, *et al.*,
Appellants,
AGAINST
Claimants of the Steamship "VICTORY" and Claimants of the Steamship "PLYMOTHIAN,"
Appellees,
AND
Claimants of the Steamship "VICTORY,"
Appellants,
AGAINST
THE CANTON INSURANCE COMPANY, LIMITED, and Claimants of the Steamship "PLYMOTHIAN,
Appellees.

BRIEF FOR PORT OF PLYMOUTH STEAMSHIP COMPANY IN SUPPORT OF ITS APPLICATION FOR A WRIT OF *CERTIORARI.*

The facts are sufficiently set forth in the petition and findings of fact contained in the opinion of the District Judge.

POINTS.

I.

The Court below erred in that having expressly found that "it would seem to be manifestly inequitable to assess upon her (*Plymothian*) one-half of the entire loss," it nevertheless proceeded to impose upon her substantially one-half of such loss (Petition, p. 16).

It is assumed, for the argument on this point, that if the Circuit Court of Appeals had not seen fit to introduce the novel doctrine of an unequal division of damages, it would have absolved the *Plymothian* from all fault. The question, therefore, arises whether under the jurisprudence of this Court, the Circuit Court of Appeals ought not on the findings of fact there reached to have dismissed the libel as against the *Plymothian*.

The rule of an equal division of damages was first established in this Court in unmistakable terms in the case of the *Catharine*, 17 How., 170. The Court said (at p. 177):

"Upon this view of the case it becomes necessary to "settle the rule of damages in a case where both vessels "are in fault. The question, we believe, has never until "now come distinctly before this Court for decision. The "rule that prevails in the District and Circuit Courts, we "understand, has been to divide the loss. This "seems now to be a well settled rule in English "admiralty. * * * Under the circumstances "usually attending these disasters, we think the rule di-"viding the loss the most just and equitable, and as best "tending to induce care and vigilance on both sides in "navigation."

This rule was first announced in modern English reports in a *dictum* by Sir William Scott in the case of *Woodrop-Sims*, 2 Dodson, 83, 85, decided in 1815.

The history of the rule as to the division of loss in English law is set forth in a most exhaustive and learned Note in *Marsden's Collisions at Sea*, (3d Edition), at page 145, where it is shown that the principle of equal division of damages in cases where two vessels are in fault has existed in English jurisprudence since 1677. It also

appears, from the same authority (pp. 126 to 130), that this rule is found in the laws of Oleron,* in the laws of Wisby, and in other mediæval maritime codes. The principle of equal division has been uniformly followed in England down to the present date.

Stoomaart Maatschappy vs. *Peninsula Co.*, 7 App. Cases, 795.

The principle of equal division laid down in the *Catharine* (*supra*), has been reaffirmed in numberless cases in this Court.

The *Continental*, 14 Wall., 345.
The *Pennsylvania*, 19 Wall., 125.
The *Teutonia*, 23 Wall., 77.
The *Sunnyside*, 91 U. S., 208.
The *America*, 92 U. S., 432.
The *Alabama and the Gamecock*, 92 U. S., 695.
The *Stephen Morgan*, 94 U. S., 599.
The *City of Hartford and the Unit*, 97 U. S., 323.
The *Virginia Ehrman*, 97 U. S., 309.
The *Connecticut*, 103 U. S., 710.
The *North Star*, 106 U. S., 17.
The *Sterling and Equator*, 106 U. S., 647.
The *Manitoba*, 122 U. S., 97.
The *Britannia*, 153 U. S., 130.

Particular attention is called to the last case as being a case of a libel for damage to cargo against two ships. The *Britannia* was found guilty of grave faults; the *Beaconsfield* was only guilty of too much caution in stoping in the face of what her navigators considered risk of collision, but the Court found she was bound to keep on her course, and divided the damages equally. So here, if the *Plymothian* was not liable for half she should have been absolved.

* "A ship is in a roadstead, moored and riding at her mooring, and another ship strikes her when she is at rest. The ship is damaged by the blow which the other has given her, and there are some wines stove in; the damage ought to be appraised and *divided by halves, between the two ships*; and the wines which are in the two ships, ought to be halved for the damage, between the merchants."

Laws of Oleron, 3 *Black Book of Adm.* (*Twiss*, 21).

II.

The omission of the *Plymothian* to stop at an earlier period than she did, was not a fault under the backing rule (Article 18).

It is seen by the diagram annexed to the plaintiff's petition, which sets forth the positions and courses of the vessels, substantially as found in the District Court, and as apparently approved in the Circuit Court of Appeals, that when the *Plymothian* got straightened out in the channel near buoy 9, and the *Victory* was going up opposite Craney Island Light. Each vessel was in position to pass to the right, and both Courts have found that there was nothing to prevent the adoption of that navigation. There is some conflict in the testimony as to whistles blown by the *Victory* and by the *Plymothian*, but the sum of the evidence appears to be that when the vessels were substantially in the positions BB shown on the diagram, the *Victory* blew two blasts on her whistle and changed her course, which she had not changed up to that time, whether she blew a previous two-blast signal or not. The learned District Judge found that as soon as she blew that whistle and began to swing over towards the easterly side of the channel and towards the *Plymothian's* course, the *Plymothian* gave alarm signals, reversed and went full speed astern, and was actually stopped still, if not making sternway in the water at the time of the collision. These findings do not appear to be upset by the decision of the Circuit Court of Appeals. The charge against the *Plymothian* in the Circuit Court of Appeals is that she did not stop when an earlier whistle was claimed to have been blown by the *Victory*.

At the time the earlier cross-signal of the *Victory* is claimed to have been blown, the District Judge finds that the vessels were more than a thousand yards apart (Petition, p. 31), and that there was at that time abundant time and room for the *Victory*, upon receiving a single blast whistle from the *Plymothian* (which that vessel subsequently gave), to correct her intended error and keep on her own side of the channel.

The *Plymothian* was justified in presuming that the other vessel would perform her duty and keep to the right on her own side of the channel, as both the law and the custom of navigation required.

New York Co. v. *Philadelphia Co.*, 22 How, 461.
The *Scotia*, 14 Wall., 170.
The *Free State*, 91 U. S., 200.
The *Illinois*, 103 U. S , 298.
The *Bridgeport*, 6 Blatch., 3.
The *Northfield*, 154 U. S., 629.

As soon as she began to swing, making an actual risk of collision, the statutory measures were immediately adopted by the *Plymothian*.

To hold that the *Plymothian* should have taken earlier precautions than she did, is in effect to hold that a vessel about to be run down, through the flagrantly negligent navigation of another, must not only stop and back, but must run away astern through the water from the wild course of the other. It is virtually holding that as towards cargo, each vessel absolutely insures against collision damage, and if the one upon which the Court thinks the damage legally ought to be imposed is not able to pay them, then the other, if she has not done everything possible—not only what is reasonably required of her, in the way of navigation, but everything which possibly could be done—she must make up the deficit.

It is assumed for the purpose of this argument that the International Rules here apply, and that by Rule 21, the *Plymothian* was on the right side of the channel, and the *Victory* was bound to be on the other side, and that nothing prevented her from being there.

If Rule 21 did not apply, but the regulations contained in the Revised Statutes of the United States did apply, then when the risk of collision became involved, the vessels must either have been under the meeting rule or under the crossing rule (Rev. Stat., Sec. 4233, Rule 18 or Rule 19). If they were under the meeting rule, when risk of collision became involved, it was plainly the duty of the *Victory* to port; and if they were under the crossing rule,

then by the decision of this Court in the *Britannia* (*supra*), it was the duty of the *Plymothian* to keep on and rely upon the presumption that the *Victory* would keep out of the way.

The claim that the *Plymothian* was in fault for not backing earlier, is based upon a most stringent application of the stopping and backing rule.

This Court, in the *Free State*, 91 U. S., 200, held that a steamer is not bound to take any steps to avoid a collision until danger of collision is apparent. That it is not the law, that the steamer must change her course or slacken her speed the instant she comes in sight of another vessel, if there is no danger of collision.

That remark would seem to have the clearest application to the situation of the vessels at the time the *Victory* claims to have blown her first two-blast signal when she and the *Plymothian* were substantially in the positions shown by A A on the diagram annexed to her petition.

Mr. Justice HUNT, in the *Free State*, said:

"The appellants insist that the rule of law is this: If "where a steam vessel is approaching another vessel, and "where a collision *might be produced* by a departure of "the latter from the rules of navigation, the former ves- "sel is bound to slacken her speed or stop and reverse. "We have examined with care the authorities cited by "the appellants, but we found none that sustain this "proposition. The rule is otherwise."

This rejected doctrine is substantially that on which the Circuit Court of Appeals attached fault to the *Plymothian* in this case.

It is not contended that at the time the *Victory* claims she blew her alleged first two-blast signal, that she made any change of course, or that she made any change of course until after she blew her second two-blasts when she was in the position B. Meantime, the *Plymothian* had blown her two single blasts which the *Victory* ought to have heard, one of which she did hear, both of which she was bound to notice and to follow. As above shown the decisions of this Court hold she had a right to presume

the *Victory* would heed them, and as soon as it was apparent the *Victory* would not do so, the other statutory duties were instantly and fully performed. This was enough.

New York & Baltimore Co. v. *Phila. & Savannah Co.*, 22 How, 461.

In the *Adriatic*, 107 U. S., 512, this Court absolved a steamer from all blame from a collision in which she sunk a sail vessel, where it was found that the steamer had stopped and reversed when the risk of collision first became apparent.

See also the *John King*, 1 U. S. App., 64.

In the *Cement Rock*, 38 Fed. Rep., 764, BROWN, *J.*, said:

"The primary fault being on the part of the *Cement* "*Rock*, all that was incumbent upon the *Alaska* was to "stop and reverse so soon as she had reason to apprehend "that the *Cement Rock* could not or would not clear her "either by crossing or by going to the right. Consider- "ing the ease with which the *Cement Rock* was handled, "and the fact that the *Alaska* must have been nearly, if "not quite stopped, I do not feel justified in holding that "she did not reverse as soon as it was evident that the "*Cement Rock* could not be expected to clear without the "*Alaska's* co operation; and unless that is reasonably "plain, upon a preponderance of proof, the vessel having "the original right of way is not to be charged with "fault."

English cases hold, that where vessels are substantially meeting, but are on courses free from danger, provided neither changes, there is no risk of collision, under Article 18, until one of the vessels manœuvers towards the course of the other; and if at such time, the other stops and reverses promptly, she is absolved from responsibility for collision brought about by the wrongful manœuver of the other vessel.

The *Jesmond* and the *Earl of Elgin*, L. R., 4 P. C., 1.

The *Rhondda*, 8 App. Cas., 549.

See also the *Milwaukee*, Brown's Adm., 313.

It is not shown that stopping earlier would have affected the result (Petition, pp. 10-11).

III.

If the Circuit Court of Appeals intended in its opinion to reverse the findings of fact of the District Court, it erred in so doing, as the great majority of the witnesses were examined before the District Judge, and his findings cannot be said to be *clearly* against the preponderance of testimony.

It is a familiar rule in appellate practice that where the witnesses have been examined before the District Judge, and the evidence discloses conflicts, upon which the credibility of the witnesses has a bearing, Appellate Courts do not reverse the findings of fact, unless they appear to be clearly against the weight of evidence.

The *Grafton*, 1 Blatch., 173.
The *Sampson*, 4 Blatch, 28.
The *Florida*, 4 Blatch., 470.
The *Sunswick*, 5 Blatch., 280.
The *Guimarais Appeal*, 28 Fed. Rep., 528.
The *Thos. Melville*, 37 Fed. Rep., 271.
The *Albany*, 48 Fed. Rep., 565.
The *Alijandro*, 56 Fed. Rep., 621.
The *City of New York*, 54 Fed. Rep., 181.
The *Wilhelm*, 59 Fed. Rep., 169.

In the cases at bar the evidence was conflicting. Two pilots and seventeen of the twenty-one disinterested eye-witnesses were examined in open court; the District Judge is one of more than twenty years experience in that district, is thoroughly acquainted with the waters in which the collision occurred, and the needs of navigation therein; is presumed to know, and did know, personally many of the disinterested eye-witnesses, who, being tugboat men, making their living in these waters, were able to give, and did give, the most intelligent account of the collision, from an unbiased standpoint and free from the excitement of impending danger. He was, therefore, peculiarly fitted to judge of their credibility, to properly weigh this con-

flicting testimony and to arrive at a just and proper conclusion. His conclusion, freeing the *Plymothian* from fault upon the facts, will be found, after examination of the accompanying record, to be not only not *clearly* against the preponderance of testimony, but fully sustained by the great weight of it.

IV.

The steamship *Plymothian*, if at fault for the collision, is freed from responsibility to her cargo owners by the express provisions of her bills of lading.

It admits (by a stipulation and exhibits, Record, p. 483–493) that every bill of lading issued by the master of the *Plymothian* for the cotton constituting this cargo, and injured as a result of this collision, contained two clauses, familiarly known as the "Negligence" clause and the "Flag" clause.

The "Negligence" clause reads as follows:

"That the vessel shall not be liable for loss or damage "occasioned * * * by collisions, stranding or other "accidents of navigation of whatsoever kind (even when "occasioned by the negligence, default, or error in judg- "ment of the *pilot*, master, mariners or other servants of "the shipowner) * * *" (R., 487–489–490).

It must be conceded that if the fault was committed on the part of the *Plymothian*, it arose from the negligence, default or error in judgment of the Virginia pilot, who was in charge of navigation, and was thus clearly within the foregoing exemption, if permitted to stand. Negligence, if any, on the part of her officers, is equally within the exemption.

The "Flag" clause is as follows:

"*This contract shall be governed by the law of the* "*flag of the vessel carrying the goods*, except that general

"average shall be adjusted according to York-Antwerp "Rules, 1890. In accepting this bill of lading, the ship- "per, owner and consignee of the goods and the holder of "the bill of lading agrees to be bound by all its stipula- "tions, exceptions and conditions, whether written or "printed, as fully as if they were all signed by such ship- "per, owner, consignee or holder, any custom of the port "notwithstanding" (R., 488-492).

By stipulation it is further agreed that the law of Great Britain, in respect to the validity of the foregoing provisions and exemptions, appears in the printed reports of the opinions of the courts of that country, and that reference may be had in the brief and upon the arguments of counsel to such printed reports, as proofs in this case of the law of Great Britain in respect to such provisions and exemptions, with the same force and effect as though the same had been formally proved and printed in the record (R., 484).

The attention of the Court is called in the petition (p. 15) to illustrative cases showing the English law. An exhaustive investigation of the state of English law on this subject has lately been made by this Court in the case of *Phœnix Insurance Co. against Liverpool et al., Insurance Co.*, 129 *U. S.*, 397.

This case, therefore, brings before the Court for determination a question never here decided, namely, whether the negligence clause exempting the ship from responsibility from the negligence of her compulsory pilot, or of its own officers, navigating the ship in conjunction with such pilot, will be upheld as a valid contract between the parties, where the contract itself expressly provides that it is to be governed by the law of the country to which the steamship (one party to the contract) and the consignee of the merchandise, under the bill of lading, belong.

The intimations of the Supreme Court are that where the parties by the contract show a mutual intention that it shall be governed by the law of a particular country, it will be governed by that law, except only in cases where the contract is illegal or immoral.

In *Liverpool Steam Co.* vs. *Phenix Ins. Co.*, 129 U. S. 397–458, Mr. Justice GRAY, in delivering the opinion of the Court, said:

"This review of the principal cases demonstrates that "according to the great preponderance, if not the uniform "concurrence of authority, the general rule, that the "nature, the obligation and the interpretation of a con- "tract are to be governed by the law of the place where "it is made, *unless the parties at the time of making it* "*have some other law in view*, requires a contract of af- "freightment, made in one country between residents or "citizens thereof, and the performance of which begins "there, to be governed by the law of that country, *unless* "*the parties when entering into the contract manifest a* "*mutual intention that it shall be governed by the law of* "*some other country.*"

The English rule is the same.

The *Industrie* (1894), Probate 58.

The Circuit Court of Appeals for the Second Circuit in the *Majestic*, 60 Fed. Rep., 624, supported this specific clause and held that nothing stood in the way of its enforcement. The point there arose in regard to damage to a passenger's baggage damaged in transit, and the steamship relied upon an exemption from negligence on the passenger's ticket, which also contained this clause:

"All questions arising on this contract shall be de- "cided according to English law, with reference to which "this contract is made."

SHIPMAN, Circuit Judge, construing that contract (p. 627), said:

"The contract was made in London or in Liverpool, "where the shipowner had a place of business, between "a British corporation, which was the shipowner, and a "citizen of the United States. The contract was for the "transportation on the high seas of passengers and their "baggage from the City of Liverpool to the City of New "York; and if the statement that it was made with ref- "erence to English law had been omitted nothing in the "contract would have indicated an intent that it was to "be controlled by the law of the United States. *Under* "*such circumstances it was an English contract and gov-* "*erned by the law of England.*"

The same point with regard to a passenger's baggage arose upon similar circumstances in *Fonseca* v. *Cunard S. S. Co.*, 153 Mass., 553. KNOWLTON, *J.*, in delivering the opinion of the Court, said:

"The contract being valid in England, where it was "made, and the plaintiff's acceptance of it under the cir- "cumstances being equivalent to an express assent to it, "*and it not being illegal or immoral*, it will be enforced "here, notwithstanding that a similar contract made in "Massachusetts would be held void as against public "policy (*Greenwood* v. *Curtis*, 6 Mass., 358; *Forepaugh* "v. *D. L. & W. Ry.*, 128 Penn. St., 217; and cases cited: "*In re Missouri S. S. Co.*, 42 Ch. D., 321, 326, 327; *Liv- "erpool Co.* v. *Phenix Ins. Co.*, 129 U. S., 397)."

The clause which was before the Court in the *Majestic* (*supra*) was also sustained and enforced by Judge MORRIS in the *Oranmore*, 24 Fed. Rep., 922, 928, under a contract made in Baltimore for the shipment of cattle to Liverpool.

In dealing with that clause of the contract which called for the application of English law (p. 927), he held:

"The presumption is that the parties enter into a con- "tract with reference to the law of the place where it is "made, but this presumption is easily overthrown by cir- "cumstances which show that this was not the intention "of the parties (*Whart. Confl. Laws*, 434).

"In *Cox* v. *U. S.*, 6 Pet., 203, it is said by the Supreme "Court:

"'The law of the place where the contract is made is to "govern in expounding and enforcing the contract, unless "the parties have a view to its being executed elsewhere, "in which case it is to be governed according to the law "where it is to be executed.'

"The present question is not one which affects the "capacity of the parties to make the contract. It is not a "case in which, according to the American law, it could "be said that there is no contract at all binding on the "parties. It is merely a question of the extent and nature "of the obligations and conditions of a contract. The "law is thus stated in *Story Confl. Laws*, 242:

"'Generally speaking the validity of a contract is to be "decided by the law of the place where it is made, unless "it is to be performed in another country; for, as we shall "presently see, in the latter case the law of the place of "performance is to govern.'

" At page 280 he further said:

" 'The rules already considered suppose the performance
" of the contract to be in the place where it is made,
" either expressly or by tacit implication. But where the
" contract is expressly or tacitly to be performed in any
" other place, there the general rule is, in conformity to
" the presumed intention of the parties, that the contract,
" as to its validity, nature, obligation and interpretation
" is to be governed by the law of the place of perform-
" ance.'

"And the author cites as clearly expressing the rule,
" the statement of Lord Mansfield:

" 'The law of the place can never be the rule where the
" transaction is entered into with an express view to the
" law of another country as the rule by which it is to be
" governed.'

" In *Whart. Confl. Laws*, 472, it is stated to be a rule
" fairly deducible from adjudged cases that where there
" are no other controlling circumstances, a contract of
" carriage is to be interpreted by the law of the carrier's
" principal office. In this case, although the contract was
" made in the United States, it was made in the port of
" Baltimore by a resident of Chicago with a British cor-
" poration for carriage in a British ship to a port in Great
" Britain, and the express agreement of the parties, delib-
" erately made two months before the shipment, was that
" any question arising against the carrier under the con-
" tract or the bill of lading should be determined by the
" English law.

" Under all these circumstances, it seems to me the
" Court should give effect to the clause of the agreement.
" *It leaves the intention of the parties beyond doubt of*
" *any kind, and that intention was to give the provisions*
" *of the bill of lading such efficacy as the English Courts*
" *would give to them.* As I understand the facts of the
" case and the rulings of the English Courts upon similar
" bills of lading, I think the exceptions cover the injuries
" sustained by this libelant, and the libel must be dis-
" missed."

This case was affirmed on appeal by Judge BOND; decision unreported.

The uniform concurrence of authority and of opinion, as expressed in text books on this subject, is that the validity and construction of the contract are to be tested by the law which the parties intended should govern their rights, unless the contract be intrinsically unjust or im-

moral, or contrary, not to the public policy of the forum as regards a single branch of municipal law, but to the national policy or institutions of the government, in which the contract is sought to be enforced.

It was plainly intimated in the MONTANA opinion (129 U. S., at p. 458), that if there had been any express provision in the bill of lading referring to the English law as the law of the contract, that law would have been enforced, and the steamship company would not have been liable. After stating the general rule with the qualification, "*unless the parties when entering into the contract manifest a mutual intention that it shall be governed by the law of some other country*," the Court further said:

"There does not appear to us to be anything in either "of the bills of lading in the present case tending to "show that the contracting parties looked to the law "of England or to any other law than that of the place "where the contract was made."

This passage appears to have reference to cases such as The ORANMORE, 24 Fed. Rep., 922, 928, and the present, where a mutual design to contract under a stated foreign law is shown on the face of the contract itself.

There is not the slightest intimation anywhere in the MONTANA opinion that if such a stipulation as we have in the present case had been in the bills of lading there considered, the Court would have found anything in the public policy of this country standing in the way of its enforcement.

The opinion of Mr. Justice GRAY recognizes and affirms the rule as declared by Lord Mansfield, before the Declaration of Independence, and which is thus authority binding upon American courts, until overruled by an American court of appellate jurisdiction, in the case of *Robinson* v. *Bland*, 1 William Blackstone, 213, that "*the* "*general rule, especially ex comitate et jure gentium*, is, "that the place where the contract is made and not "where the action is brought, is to be considered in "expounding and enforcing the contract; but this rule "admits of an exception where the parties, at the time

"of making the contract, had a view to a different "kingdom."

Other cases where the foreign law has been applied, are:

The *Carib Prince*, 63 Fed., 266; 68 *Id.*, 254.
The *Triniacria*, 42 Fed., 863.
Baetjer v. *Compagne Generale*, 59 Fed., 789.

What is the objection to settling the questions which have now arisen, and are here in judgment, according to the law which the parties have deliberately chosen?

The point has not arisen before, as far as we can find, with reference to a pilot.

In some District Court cases it has been said that to permit, subversive of the doctrines and policy of our Federal laws, carriers to exempt themselves from the results of their *servants'* negligence would be subversive of our public policy.

The *Iowa*, 50 Fed., 561.
The *Energia*, 56 Fed., 124.
The *Hugo*, 57 Fed., 403.
Lewisohn v. *Natl. S. S. Co.*, 56 Fed., 602.

Such might indeed be the *effect* if the *servants* were here in fact, but it is fallacious to argue that therefore such was the *design*. We have here a printed form of bill of lading. It does not refer to the *English* law *eo nomine*. If merchandise were shipped under it upon a Spanish, French or American vessel, the law of the flag would be the law to be applied, irrespective of the destination. The clause embodies a principle of general application, and is not intended to prefer any particular law in general over any other law: it leaves everything to go by the law of the ship's country. It is no sound reason for refusing to uphold such a provision that as applied to a particular instance it overrides our own law, unless the contract is illegal or intrinsically immoral.

Indeed, no sound reason is perceived why our courts should refuse to effectuate a preference distinctly expressed by the parties to a contract, for some other law than our own, if they think such other law more equitable or just,

or want it for other reasons, even though our Judges should think the parties ought not to prefer it or want it as a rule for settling their contracts.

The District Court cases in the Second Circuit, which have held that the foreign law should not be applied to sustain a negligence exemption, must be deemed to be overruled by the subsequent case of the *Majestic*, 60 Fed., where their reasoning is disapproved. The case of the *Hugo*, above cited, came before the Circuit Court of Appeals, and was decided upon grounds which made it unnecessary to determine this point; but an application was subsequently made to this Honorable Court for a writ of *certiorari*, on the ground that the validity of the so-called "flag clause" was necessarily involved in the case, and in April, 1895, this Court issued its writ as prayed. The exact point is now before your Honors for decision.

The validity of contracts is usually tested by the *lex loci contractus*, as that which the parties presumably contemplated in entering into their agreements. If we take the expression of the parties upon this point as better evidence of intention than presumption, the cases that have laid down the rule as to when the *lex loci* shall afford the rule for expounding the contract, will show equally when the deliberately chosen law can be applied.

What, then, is the general rule and what are its exceptions?

In *Harrison* v. *Sterry*, 5 Cranch, 289, Chief Justice MARSHALL laid down the rule broadly that

> "The law of the place where the contract is made is, "generally speaking, the law of the contract; that is, "it is the law by which the contract is expounded."

In *Van Reimsdyk* v. *Kane*, 1 Gallison, 371, 375, Judge STORY, in dealing with a contract made in Java, stated the limitations upon the principle as follows:

> "The rule is well settled that the law of the place "where a contract is made is to govern as to the nature, "validity and construction of such contract; and that "being valid in such State, it is to be considered as "equally valid and to be enforced everywhere, *with the "exception of cases in which the contract is immoral or*

"*unjust, or in which the enforcing it in a State will be* "*injurious to the rights, the interest or the convenience* "*of such State or its citizens.* This doctrine is explicitly "averred in *Huberus De Conflictu Legum*, 2 Tombe, lib. "1, tit. 3, and has become incorporated into the code of "national law in all civilized countries" (citing many authorities).

On appeal, 9 Cranch, 153, at p. 162, MARSHALL, *C. J.*, said:

"There is no evidence that the contract is not allow- "able by the laws of Batavia; nor did the owners when "informed of it complain of its terms. The Court cannot "presume that it is illegal."

In his *Conflict of Laws*, Secs. 244, 245, 246, Judge Story deals with the limitations above suggested upon the general principle, and the only cases falling within the limitations, in support of which his great learning could furnish any authority, are (1) contracts in fraud or evasion of the customs laws of the forum; (2) contracts for distribution of proceeds of prize, resulting from collusive capture and condemnation procured in our courts by enemies; (3) cases to recover the price of slaves sold abroad; to which a distinguished French writer, *Foelix* 1 *Droit International Privé*, 256, adds another category, namely (4), cases of gambling contracts, and those relating to lotteries.

Plainly our policy regarding negligence clauses falls within none of these classes.

KENT, 2 Com., 444–5, lays down the rule thus:

"The necessary intercourse of mankind requires that "the acts of parties, valid where made, should be recog- "nized in other countries, provided they be *not contrary* "*to good morals, nor repugnant to the policy and posi-* "*tive institutions of the State.*"

The exceptions of his definition obviously refer to something more than the mere policy of a country in a single branch of its municipal law; they relate to matters opposed to the fundamental principles upon which the Gov-

ernment exists, *e. g.*, contracts for traffic in slaves, or touching smuggling or piracy.

In Hon. David Dudley Field's *Outlines of an International Code*, Articles 602, 603, the rule upon this matter was proposed as follows:

"602. Subject to Articles 604 and 605, a contract made "within the jurisdiction of one nation, and agreed ex- "pressly or tacitly to be performed either wholly or "partly within the jurisdiction of another, is governed "as to its validity by the law of the place where it is "made; and as to its interpretation, by the law actually "or presumptively intended by the parties for that pur- "pose, as provided in the next article.

"603. The law intended by the parties to govern the in- "terpretations of any stipulation of their contract is "deemed to be:

"1. The law of any nation named by them as part of "their contract; or

"2. *If no such law is so named*, the law of the place "which such stipulation is agreed to be wholly per- "formed; or

"3. If no such law or place of performance is specified, "the law of the place of the making of their contract; "but in this case a contrary intention may be shown."

Articles 604 and 605 proposed to except from the operation of these rules the cases only (1) a contract forbidden by an *express* provision of law, or (2) which is unlawful everywhere in civilized countries, or (3) is made with intent to violate an *express* provision of this Code or of the laws of any nation a party to the Code.

It was never suggested in the proceedings of the Society for the Codification of the Law of Nations that these sections proposed any innovations upon the generally received rule, or placed any restriction upon the acknowledged classes of exceptions in which the rule is not to be observed.

FOELIX, the most distinguished modern Continental writer on the subject, states the general rule as practised in countries following the Civil Law (1 *Droit International Privé*, p. 223) as follows:

"Le principe général en cette matiére est que les parties "contractantes ont eu l'intention de se conformer, dans

" leur conventions à la loi du lieu où celles-ci ont été
" consenties et sont devenues parfaites, et par suite de les
" soumettre à cette loi; en d' autres termes, que la valeur
" intrinsèque, la substance, le lien, *vinculum juris*, des
" conventions depend de la loi du lieu où elles ont recu
" leur perfection; l'acte valable où nul d'après cette loi
" le sera également partout " * * *

" Lorsque les contractants *n'ont pas expressément adopté*
" la loi de lieu où le contrat a été passé alors commence
" les presomptions " (p. 225).

" Lorsque le divers contractants n'ont pas la même pat-
" rie le même domicile, on ne saurait donner la préférence
" aux lois de la patrie où du domicile de l'un d'eux ni juger
" sur l'intention que l'un d'eux pretendrait avoir eue de
" se rapporter aux lois et usages de sa patrie; car il est
" de l'essence de toute convention qu'il y ait consentement
" commun des parties sur tout ce que compose le contrat.
" Dès lors on a dû admettre que leur volunté s'en rap-
" portée à une loi commune et par un accord à peu près
" unanime, les auteurs et les tribunaux ont admis en
" principe qu'il faut s'arrêter à la loi du lieu où le contrat
" a été passé " (p. 228).

To this effect *Story, Conflict of Laws*, Sections 239, 240, 241, 242.

FOELIX states the exception thus: " Lorsque le contrat est contraire aux bonnes moeurs ou aux institutions ou prohibitions existant dans le pays où il doit recevoir son exécution ou lorsqu, il porte prejudice soit aux intérêts d'une nation, soit aux droits acquis par les citoyens de cette nation" (p. 235).

It is noteworthy that he does not include public policy within the exception.

The English Courts have not always admitted the exceptions to the rule as broadly as we admit them. They enforced foreign contracts for the execution of purposes illegal according to English law, although legal by law of the place of contract. When, for example, a foreigner has contracted with a subject, or even a subject with a subject, without the country for a supply of goods to be run into England in fraud of the French revenue law, the vendor himself having taken no active part over and above the mere knowledge of the intent in the smuggling

transaction, English courts have supported the contract against the vendee (*Holman* v. *Johnston*, Cowp., 341; *Biggs* v. *Lawrence*, 3 Durn. and East., 459; *Clugas* v. *Penaluna*, 4 Durn. and East., 466; *Vandyek* v. *Hewitt*, 1 East., 96; *Waymell* v. *Read*, 5 Durn. and East., 596).

The English judges have even upheld a contract for the sale of a slave made within a State where slavery is a legal institution, although slavery is abhorrent to the English national conscience and slave trade is, in an English subject, piracy.

Santos v. *Illidge*, 6 C. B., N. S., 841.

The King's Bench has approved a verdict with ruinous damages given against the commander of an English man-of-war on action by the Spanish owner of a captured slaver in days when Spain had not yet entirely discountenanced traffic in slaves.

Said BEST, *J.*:

"The statutes which have been referred to speak in "just terms of indignation of the horrible traffic in human "beings; but they speak only in the name of the British "nation. The declaration of the British legislature, that "the slave trade is contrary to justice and humanity, "cannot affect the subjects of other countries or prevent "them from carrying on this trade out of the limits of "the British dominions. The assertion of the right to "control the subjects of other States in this respect would "be inconsistent with independence, which we acknowl-"edge that every foreign government possesses. If a ship "be acting contrary to the general law of nations, she is "thereby subject to confiscation; but it is impossible to "say that the slave trade is contrary to what may be "called the common law of nations. It was, until lately, "carried on by all the nations of Europe. A practice so "sanctioned can only be rendered illegal by the consent "of all the powers. Most of the States of Christendom "have now consented to the abolition of the slave trade, "and concurred with us in declaring it to be unjust and "inhuman. These subjects of any of these States could "not, I think, maintain an action in the Courts of this "country for any injury happening to them in the prose-"cution of this trade; but Spain has reserved to herself "the right of carrying it on in that part of the world "where this transaction occurred. Her subjects could

" not be legally be interrupted in buying slaves in that " part of the globe, and have a right to appeal to the jus- " tice of this country for any injury sustained by them " from such an interruption."

Madrazo v. *Willis*, 3 Barn. and Ald., 353.

As pointed out by Chancellor KENT (2 Comment., 455), if one independent State allows commercial intercourse and contracts between its citizens and those of another, the rights of the parties and the relations between them would seem to have a higher right than mere comity—a claim of justice, a right to demand performance of valid, legal and moral conventions in whatever Court such rights and obligations are the subject of judicial inquiry. Not to do that is in effect to say that a contract valid, if sued on in Paris, in Berlin or in London, will be void if sued on in the courts of the United States; and to refuse to apply the governing law the parties have explicitly chosen, is to affirm that no agreement of the parties, however solemn or explicit, can obviate that unfortunate result. Moreover, it is to say that a contract may not be enforced at one period in courts of the United States, when a certain condition of public policy prevails, although a similar contract made at a different time may be enforced, if Congress should chance to decide upon a different public policy; for public policy changes with the passage of time and with the course of legislation.

In the *United States* v. *Trans-Missouri Freight Association*, 58 Fed., 58, SANBORN, *J.*, in delivering the opinion of the Circuit Court of Appeals upon a question involving considerations of public policy (at p. 68) said:

" But when it becomes necessary to consider grounds " of public policy in the determination of a case, it is " well to bear in mind the oft-quoted remark of Justice " Burrough in Richardson *v.* Mellish, 2 Bing., 252, that " public policy ' is a very unruly horse, and when you " get astride of it you never know where it will carry " you. It may lead you from the sound law.' Public " policy changes with the changing conditions of the " times."

It is for this reason that the courts of high authority have refused to admit cases of contracts opposed to pub-

lic policy, as an exception to the general rule, along with those that are illegal or immoral. To say that an exemption from the negligence of one's servants is unjust or immoral is to run counter to the view prevailing in every maritime country in Europe, in most of those of South America and in many States of the Union. Hence it is that the highest courts of many of the States have declined to consider it as falling within the exception to the general rule.

Fonseca v. *Cunard*, 153 Mass., 553.
Forepaugh v. *Delaware Ry.*, 128 Penn. St., 217.
Brown v. *Browning*, 15 R. I., 422.
Gross v. *Jordan*, 83 Maine, 380.
Dugan v. *Lewis*, 79 Texas, 246.

The contract here in question is not opposed to any public policy prevailing at the present time. The third section of the act of Congress entitled "An Act relating to Navigation, Bills of Lading," &c., approved February 13, 1893, provides:

"That if the owner of any vessel transporting mer-
"chandise or property to or from any port in the United
"States of America, shall exercise due diligence to make
"the vessel in all respects seaworthy and properly manned,
"equipped and supplied, *neither the vessel or owner, or*
"*owners*, agents, or charterers, *shall become or be held re-*
"*sponsible for damage or loss resulting from faults or*
"*errors of navigation or in the management of said ves-*
"*sel.*"

If that statute were the law for the present case, and the Court should reach the conclusion that the loss arose from negilence of the pilot, then so far from an exemption against such damage being contrary to our public policy, the specific loss would fall within an exemption provided by national legislation.

The *Silvia*, 64 Fed., 607.
The *Elona*, 64 Fed., 880.

In the *Silvia*, on appeal to the Circuit Court of Appeals (68 Fed., 230), WALLACE, *Circuit Judge*, in affirming the decree below, said:

" Read as a whole, the purpose of the act manifestiy is, " on the one hand, in the interests of the public to prevent " carriers from evading responsibility to exercise due dili- " gence in providing sea for vessels, and in the handling " and care of the cargo; and on the other hand, whenever " they have exercised due diligence in these respects, to " absolve them from liability for loss arising during the " transit, from the perils of the sea and from faults or " errors in the navigation or management of vessels."

It is noticeable that none of the cases under the law as it stood before the Act of 1893, dealt with an exception from liability for faults or errors in navigation by a *pilot*. The language of the statute is most apt to include such negligence and to relieve the shipowner from it. While that act has no direct bearing on the present controversy, it may be looked at as a legislative view of public policy, and as showing the futility and substantial injustice of adding to the few exceptions to the great rule that the chosen law of the contract should be applied in its interpretation, a principle of such slight consequence that it is subject to be changed by legislative enactment from time to time, even between the occurrence of accidents and the trial of cases growing out of them, in the ultimate Court of Appeal.

Last Point.

The petitioner's application for a writ of *certiorari* herein should be granted.

Respectfully submitted,

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